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CHEVRON U.S.A., INC., PETITIONER,

v.

MARIO ECHAZABAL, RESPONDENT.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Americans with Disabilities Act requires an employer to hire an individual whose medical condition makes performing the job an imminent threat to his own life or safety.

RULE 29.6 STATEMENT

On October 9, 2001, Chevron Corporation merged with Texaco, Inc., and was renamed ChevronTexaco Corporation. ChevronTexaco Corporation is the parent of petitioner Chevron U.S.A., Inc. No other publicly held company owns 10 percent or more of petitioner's stock.

Irwin Industries, Inc., was a defendant in the district court but was not a party to the proceeding in the court of appeals and is not a petitioner here.

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Chrysler Corp. v. *Brown*, 441 U.S. 281 (1979) 39

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Commercial Molasses Corp. v. *New York Tank Barge Corp.*, 314 U.S. 104 (1941) 49

Concrete Pipe & Prods., Inc. v. *Construction Laborers Pension Trust*, 508 U.S. 602 (1993) 49

Cruzan v. *Director, Missouri Dep't of Health*, 497 U.S. 261 (1990) 29

D'Amico v. *New York*, 132 F.3d 145 (2d Cir. 1998) 47

Davis v. *United States*, 495 U.S. 472 (1990) 18

Doe v. *New York Univ.*, 666 F.2d 761 (2d Cir. 1981) 48

Dothard v. *Rawlinson*, 433 U.S. 321 (1977) 36

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EEOC v. *Commercial Office Prods.*, 486 U.S. 107 (1988) 19

Federal Land Bank v. *Bismarck Lumber Co.*, 314 U.S. 95 (1941) 31

Fitzpatrick v. *City of Atlanta*, 2 F.3d 1112 (11th Cir. 1993) 21

Foreman v. *Babcock & Wilcox Co.*, 117 F.3d 800 (5th Cir. 1997) 21, 42, 46, 48

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Granite Constr. Co. v. *Superior Court*, 197 Cal. Rptr. 3 (Ct. App. 1983) 27

Harris v. *Chisamore*, 85 Cal. Rptr. 223 (Ct. App. 1970) .. 26

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Lowe v. *Alabama Power Co.*, 244 F.3d 1305 (11th Cir. 2001) 42

Moses v. *American Nonwovens*, 97 F.3d 446 (11th Cir. 1996) 21

New York City Transit Auth. v. *Beazer*, 440 U.S. 568 (1979) 21

Patterson v. *Summers*, 2000 WL 366113 (E.E.O.C. 2000) 20

Pauley v. *BethEnergy Mines, Inc.*, 501 U.S. 680 (1991) ... 33

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People v. *Pymm*, 563 N.E.2d 1 (N.Y. 1990) 27

Reno v. *Koray*, 515 U.S. 50 (1995) 32

Russell v. *Bush & Burchett, Inc.*, 2001 WL 1524554 (W. Va. 2001) 26

Sandusky v. *Workmen's Comp. Appeal Bd.*, 487 A.2d 1019 (Pa. Commw. 1985) 23

School Board of Nassau County v. *Arline*, 480 U.S. 273 (1987) 18, 47

Smith v. *I.R. Equipment Corp.*, 400 N.Y.S.2d 900 (App. Div. 1977) 23

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Strathie v. *Department of Transp.*, 716 F.2d 227 (3d Cir. 1983) 48

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United States v. *Barnes*, 222 U.S. 513 (1912) 33

United States v. *Mead Corp.*, 121 S. Ct. 2164 (2001) 19

United States v. *New York Tel. Co.*, 434 U.S. 159 (1977) 31, 32

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Washington v. *Glucksberg*, 521 U.S. 702 (1997) 29

Watt v. *Alaska*, 451 U.S. 259 (1981) 19

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Cal. Penal Code § 192(b) 27

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43 Fed. Reg. 12293 (Mar. 24, 1978) 47

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Miscellaneous:

Deborah Bender, *Echazabal v. Chevron: A Direct Threat to Employers in the Ninth Circuit*, 76 WASH. L. REV. 859 (2001) 25

Michael Blotzer, *OSHA Recordkeeping and Workers' Compensation*, 56 OCCUPATIONAL HAZARDS 67 (1994) 23

John Burnett, *The Enigma of Workers' Compensation Immunity*, 28 FLA. ST. U. L. REV. 491 (2001) 26

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2 DAN B. DOBBS, THE LAW OF TORTS (2001) 26

Robert Eckhardt, *The Moral Duty to Provide Workplace Safety*, PROFESSIONAL SAFETY 36 (Aug. 2001) 28

EEOC, A Technical Assistance Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-14 (Jan. 1992) 4

Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act*, 64 TEMP. L. REV. 521 (1991) 36, 38, 47

H.R. Conf. Rep. No. 101-596 (1990) 30

H.R. Rep. No. 101-485 (1990) ..... *passim*

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2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE (E. Braunwald *et al.*, eds., 15th ed. 2001) 8

Dwight Harshbarger, *Managing Safety from the Executive Suite*, 70 OCCUPATIONAL HEALTH & SAFETY 28 (2001) 22, 23

Veronica Hellwig, *Integrating Disability Management to Help Improve the Bottom Line*, 15 COMPENSATION & BENEFITS MGMT. 43 (1999) 22

3 LARSON'S WORKERS' COMPENSATION LAW (2001) 23

David Mahoney & Jeffrey Kendall, *OSHA's Medical Surveillance and Removal Programs*, 42 U. PITT. L. REV. 779 (1981) 25, 44

R. WAYNE MONDY, ROBERT M. NOE & SHANE R. PREMEAUX, HUMAN RESOURCE MANAGEMENT (8th ed. 2002) 22, 28

National Digestive Diseases Information Clearinghouse, *Chronic Hepatitis C: Current Disease Management*, http://www.niddk.nih.gov/health/digest/pubs/chrnhepc/chrnhepc.htm (visited Oct. 31, 2001) 9

NIH Consensus Development Conference on Management of Hepatitis (Mar. 1997) 9

TABLE OF AUTHORITIES-Continued

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NIOSH, *Master Index of Occupational Health Guidelines for Chemical Hazards* (Index 1981, Supp. I-IV 1988-1995) 6

OSHA, Standards Interpretation, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html 24

MARION K. PINSDORF, COMMUNICATING WHEN YOUR COMPANY IS UNDER SIEGE: SURVIVING PUBLIC CRISIS (3d ed. 1999) 23

LINDA ROSENSTOCK & MARK R. CULLEN, TEXTBOOK OF CLINICAL OCCUPATIONAL AND ENVIRONMENTAL MEDICINE (1994) 7, 9

Mark Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379 (1983) 6, 21

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2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION (6th ed. 2000) 33

Statement of President George Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990) 19, 46

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Steven Van Yoder, *Retailers Target Hidden Costs of On-the-Job Injuries*, STORES 62 (Dec. 1999) 24

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1996) 44, 45

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The amended opinion of the court of appeals (J.A. 196-217) is reported at 226 F.3d 1063 (superseding the opinion reported at 213 F.3d 1098). The court of appeals' opinion addressing respondent's state law intentional interference with contract claim (J.A. 218-221) is unreported. The opinion of the district court (J.A. 171-195) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 23, 2000. Petitioner filed a timely petition for rehearing and rehearing en banc on June 9, 2000. The court of appeals denied the petition for rehearing on December 12, 2000. Pet. App. 30a. The petition for certiorari was filed on March 9, 2001, and granted on October 29, 2001. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS INVOLVED

Relevant portions of the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq.*, and of the Rehabilitation Act, 29 U.S.C. § 701 *et seq.*, together with pertinent parts of the regulations implementing those statutes, 29 C.F.R. § 1614.203 and Part 1630, are reproduced at Pet. App. 58a-61a.

STATEMENT

Chevron U.S.A., Inc. (Chevron) withdrew an offer to employ respondent Mario Echazabal in a refinery job in which he inevitably would have been exposed to liver-toxic substances after Chevron's physicians determined that respondent had a "history of a long term liver problem, [a] diagnosis of chronic active Hepatitis C, and significantly elevated liver enzymes over a period of years." J.A. 39. Chevron's physicians concluded that the "exposure to hepatotoxic chemicals" involved in the job "would further damage [respondent's] already reduced liver capacity," "seriously endanger his health," and

"potentially cause [his] death." J.A. 39-40. Respondent's own doctor advised Chevron that respondent should not be exposed to hepatotoxins. J.A. 98, 163-164.

The question in this case is whether the Americans with Disabilities Act (ADA) permits an employer to refuse employment to a person who it determines, based on the reasonable, individualized, and objective conclusions of physicians, would face a substantial risk of significant harm or death in carrying out the essential functions of the job. Striking down a contrary regulation of the Equal Employment Opportunity Commission (EEOC), the Ninth Circuit majority (Reinhardt and Bright, JJ.) concluded that it is not a defense to ADA liability that doing the job would threaten the health or life of the applicant or employee. The court also concluded that a person who will likely suffer injury or death on the job because of a medical condition is nevertheless a "qualified individual" entitled to the protection of the ADA. As Judge Trott explained in dissent and as other courts of appeals have concluded, those "bizarre" rulings (J.A. 215) are inconsistent with the text of the ADA, are contrary to Congress's intent, and fail to give due deference to EEOC regulations, which recognize the business necessity of excluding persons from jobs that will harm them.

A. The Statutory Scheme And EEOC's Regulations.

Title I of the ADA prohibits an employer from discriminating against a "qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). A "qualified individual with a disability" is a person with a disability "who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8). In determining "what functions of a job are essential," the ADA provides that "consideration shall be given to the employer's judgment." The employer's preparation of a "written description" of the job "shall be considered evidence of the essential functions of the job." *Ibid.*; see also 29 C.F.R. § 1630.2(n).[1]

Discrimination prohibited by the ADA includes "using qualification standards * * * that screen out or tend to screen out" persons with disabilities "unless the standard * * * is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Accordingly, the Act specifies that it is "a defense to a charge of discrimination" that "qualification standards" that screen out persons with disabilities are "shown to be job-related and consistent with business necessity." *Id.* § 12113(a).

The ADA supplies one example of an acceptable "qualification standard," providing that the "term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." 42 U.S.C. § 12113(b). A "direct threat" is "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

Shortly after the ADA was adopted, the EEOC promulgated regulations providing, in accordance with sections 12112(b)(6) and 12113(a) of the Act, that an employer may defend against a charge that a qualification standard is discriminatory by showing that the standard is "job-related and consistent with business necessity." 29 C.F.R. § 1630.15(b)(1). The regulations define "qualification standards" as "personal and professional

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[1] For purposes of its summary judgment motion, Chevron did not dispute that Echazabal has a "disability" within the meaning of the ADA, 42 U.S.C. § 12102(2), and that issue accordingly is not before this Court. J.A. 184 n.6. Whether a "reasonable accommodation" could protect respondent from exposure to liver-toxic substances also is not at issue here, for in the courts below "plaintiff [did not] argue that 'reasonable accommodation' could or should have been made by Chevron." *Ibid.*

attributes including * * * physical, medical, safety and other requirements" established by an employer as eligibility requirements for the job. *Id.* § 1630.2(q).

In elucidating the "qualification standards" defense, the EEOC specified that "[t]he term 'qualification standard' may include a requirement that an individual shall not pose a direct threat to the health or safety *of the individual* or others in the workplace." 29 C.F.R. § 1630.15(b)(2) (emphasis added). The regulations accordingly define "direct threat" to mean "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation." *Id.* § 1630.2(r). To determine whether a person poses a "direct threat," an employer must make "an individualized assessment of the individual's present ability to safely perform the essential functions of the job * * * based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." *Ibid.*

The EEOC further elaborated upon the direct threat qualification standard in Interpretive Guidance promulgated contemporaneously with its regulations. 29 C.F.R. Part 1630, App. EEOC's Guidance reiterates that "[a]n employer may require, as a qualification standard, that an individual not pose a direct threat to the health and safety of himself/herself." The determination whether a person poses a direct threat to self "must be based on individualized factual data" and "valid medical analyses" or "other objective evidence," not on "subjective perceptions," "[g]eneralized fears," or "stereotypic or patronizing assumptions." As an example of this qualification standard, the Guidance states that an employer need not hire a person with narcolepsy "who frequently and unexpectedly loses consciousness for a carpentry job the essential functions of which require the use of power saws and other dangerous equipment." *Ibid.*; see also EEOC, A Technical Assistance

Manual on the Employment Provisions (Title I) of the Americans with Disabilities Act IV-14 (Jan. 1992), E.R. 549.[2]

B. The Plant Helper Job.

This case involves respondent Mario Echazabal's 1995 application for the position of plant helper in the Coker/Sulfur Acid Division ("coker unit") at Chevron's El Segundo, California refinery. E.R. 116; J.A. 53-54, 59-67. Chevron had prepared a written description of the "physical abilities" required for the plant helper job and of the position's "environmental demands." Chevron specified the "ability/demand" of working in an environment containing "contaminants and chemicals," identified as "hydrocarbon liquids & vapors, acid, caustic, refinery waste water and sludge, petroleum solvents, oils, greases, [and] chlorine bleach." J.A. 65-66.

The coker unit at the El Segundo refinery processes residium oil to extract useful byproducts. Operators heat the residium in furnaces, then pump it into coke drums. Under heat and pressure in these 100-foot-tall, 30-foot diameter drums, hydrocarbon distillates like naphthas, as well as recyclable oils, are separated out and taken away. Corrosion inhibitors and antifoaming agents are used during this process. Once distillation is complete, the sealed coke drums are flushed with water. As the drums drain, plant helpers remove the top and bottom heads from the drums (using solvents to loosen bolt heads), which exposes the helpers to steam contaminated by the coke. A plant helper then uses a high pressure water spray to cut the coke away from the drums so that it falls into an open coke pit (which can result in a blowback of coke dust to the plant helper's work station). Plant helpers use a crane to lift coke from the pit onto a conveyer belt for removal. Plant helpers are also responsible for cleaning heads, inlet lines, and other

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[2] "E.R." refers to Echazabal's Excerpts of Record filed in the court of appeals.

equipment, greasing valves, resealing the drum heads using greases and oils, and cleaning coke from the coke pit and conveyer system. J.A. 46-49, 59-66.

The materials produced by the distillation process and the chemical ingredients of products used in the coker unit include hydrocarbons and solvents such as naphtha, naphthalene, benzene, ethylenediamine, ethylene glycol, phenol, toluene, octane, xylene, and heptane. J.A. 30-31, 68-74. In addition, fumes and gases from welding operations in the unit include manganese, lead, and other metals. J.A. 29, 48-49, 75-78. Though these chemicals are present in the coker unit at concentrations deemed permissible by government agencies, monitoring has shown that concentrations occasionally exceed permissible levels, and it is uncontradicted that a "major event, *e.g.*, major leak, fire or explosion" can result in a "major exposure." J.A. 29, 47.[3]

Occupational health guidelines compiled by the National Institute for Occupational Safety and Health (NIOSH)—"OSHA's research arm" and part of the Centers for Disease Control and Prevention (CDC)—indicate that each of these substances present in the coker unit raises health concerns for persons with impaired liver function. See NIOSH, *Master Index*

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[3] Government exposure standards do "not attempt to deal with the problem of susceptible workers" like Echazabal, whose preexisting medical conditions place them at greater risk. MARK ROTHSTEIN, OCCUPATIONAL SAFETY AND HEALTH LAW 95 (4th ed. 1998); see *Industrial Union Dep't* v. *American Petroleum Inst.*, 448 U.S. 607, 641 (1980) (exposure levels set by these standards and enforced by the OSH Act are "not designed to require employers to provide absolutely risk-free workplaces"). Because "all humans vary in their susceptibility to illness[,] only zero exposure limits could protect all employees from the risk of occupational disease." Mark Rothstein, *Employee Selection Based on Susceptibility to Occupational Illness*, 81 MICH. L. REV. 1379, 1426 (1983).

of Occupational Health Guidelines for Chemical Hazards (Index 1981, Supp. I-IV 1988-1995), http://www.cdc.gov/niosh/chem-inx.html (visited Nov. 2, 2001); *Industrial Union*, 448 U.S. at 619 & n.10.[4] See also LINDA ROSENSTOCK & MARK R. CULLEN, TEXTBOOK OF CLINICAL OCCUPATIONAL AND ENVIRONMENTAL MEDICINE 431-432 (1994) (toluene, benzene and other solvents, hydrocarbons, and lead are "major human hepatotoxins" dangerous to persons with liver disease).

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[4] See U.S. Dep't of Health and Human Services and Dep't of Labor, *Occupational Safety and Health Guideline for Benzene* 2 (1988) (recommending pre-employment tests for the "function and integrity of the ** * liver" before "placing a worker in a job with a potential for exposure to benzene"); *Occupational Health Guideline for Toluene* 1 (1978) ("Examination of the * * * liver * * * should be stressed" in order "to detect pre-existing conditions that might place the exposed employee at increased risk"); *Occupational Health Guideline for Naphtha (Coal Tar)* 1 (1978) ("coal tar naphtha" could be dangerous for "persons with impaired liver function"); *Occupational Health Guideline for Octane* 1 (1978) (same); *Occupational Health Guideline for Heptane* 1 (1978) (same); *Occupational Health Guideline for Naphthalene* 1 (1978) (naphthalene exposure "may cause * * * liver damage"); *Occupational Safety and Health Guideline for Ethylene Glycol* 3 (1995) ("By ingestion or percutaneous absorption, ethylene glycol causes * * * liver * * * damage"); *Occupational Health Guideline for Ethylenediamine* 1 (1978) ("Liver * * * damage may occur from repeated exposure to this chemical"); *Occupational Health Guideline for Xylene* 1 (1978) ("xylene vapor" linked to "reversible [liver] damage"); *Occupational Health Guideline for Phenol* 1 (1978) ("liver damage has been observed in humans exposed to phenol"); *Occupational Safety and Health Guideline for Inorganic Lead* 2 (1988) ("the highest accumulation" of inhaled or ingested lead occurs "in the liver and kidneys, and elimination is slow"); *Occupational Safety and Health Guideline for Manganese* 1 (1978) ("Persons with a history of * * * liver dysfunction" are "at increased risk from exposure").

C. Chevron's Determination That Respondent Was Not Qualified For The Plant Helper Job.

Mario Echazabal worked at the El Segundo refinery from 1972-1975 and 1979-1996. J.A. 117, 197. Throughout that time he was employed by independent contractors, most recently by Irwin Industries, Inc. (Irwin). For Irwin, he "worked throughout the Refinery" as a "laborer, helper, and pipefitter" and on the "fire watch." J.A. 117.

In 1992, Echazabal applied to work directly for Chevron in the coker unit and was offered the job contingent on a satisfactory medical examination. Chevron's regional physician, Dr. Philip Baily, who had studied toxicology and was Board Certified in preventive occupational medicine, conducted that examination. J.A. 157, 212. After a blood test showed that Echazabal had significantly elevated liver enzymes, Dr. Baily concluded that he had "an uncorrectable liver abnormality, and should avoid exposure to solvents or other liver toxic chemicals in order not to exacerbate his liver problems." J.A. 157-158, 172-173. In 1993, Dr. Baily's successor, Dr. Kenneth McGill, agreed with that assessment. On that basis, Chevron rescinded its offer of employment to Echazabal, who continued to work at the refinery for Irwin. J.A. 173. Chevron's doctors advised Echazabal to follow up with his own physicians, who subsequently confirmed that Echazabal had "abnormal liver function tests," diagnosed him with chronic active Hepatitis C, and treated his condition with the drug Interferon. J.A. 118, 122-125. Chronic active Hepatitis C is "a progressive disorder that can lead to cirrhosis, liver failure, and death." 2 HARRISON'S PRINCIPLES OF INTERNAL MEDICINE 1744 (E. Braunwald *et al.*, eds., 15th ed. 2001).

In late 1995, Echazabal applied again to Chevron for a position as plant helper in the coker unit. E.R. 116; J.A. 53-54. Chevron's official "job summary" outlined the duties and "physical/environmental demands" of that job, including the

requirement that the applicant be able to work in an environment containing hydrocarbons, solvents, and other chemicals. J.A. 65-66. Chevron again offered Echazabal the job contingent upon his passing a medical examination. J.A. 55.

In connection with Echazabal's medical examination, Dr. McGill—a physician in Chevron's refinery clinic who has practiced industrial medicine since 1980—reviewed the results of eight blood tests performed between 1992 and 1996. J.A. 37. All of those tests showed that Echazabal had significantly elevated levels of multiple liver enzymes. J.A. 41-44.[5] Dr. McGill concluded from those tests and Echazabal's diagnosis of chronic active Hepatitis C that Echazabal's "liver ha[d] already suffered significant damage," resulting in "a greatly decreased capacity to process toxins," and that continued

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[5] Echazabal's aspartate aminotransferase (AST or SGOT) level was 147 units/liter in January 1996, three times higher than the normal level of 50. His alanine aminotransferase (ALT or SGPT) level was 329, six times the normal maximum of 55. Other test results that Dr. McGill reviewed showed Echazabal's ALT in the 490s and 500s, eight to ten times the norm, and his AST in the 200s, four times the norm. J.A. 41-43. These "markers of hepatocellular necrosis" provide the "[b]est available test" for "cytotoxic injury" to the liver. ROSENSTOCK & CULLEN, *supra*, at 425-426. The National Institutes of Health (NIH) describe the disease indicated by ALT levels like Echazabal's that are more than five times the norm as "severe." NIH Consensus Development Conference on Management of Hepatitis C 21 (Mar. 1997). Echazabal's reliance on his normal level of albumin and normal prothrombin time ignores NIH's warning that those tests "are normal until late-stage disease." National Digestive Diseases Information Clearinghouse, *Chronic Hepatitis C: Current Disease Management*, http://www.niddk.nih.gov/health/digest/pubs/chrnhepc/chrnhepc.htm (visited Oct. 31, 2001). Both "tests are limited clinically by poor sensitivity" because "[o]ver 90%" of "[h]epatic function" "must be destroyed before measurable changes * * * occur." ROSENSTOCK & CULLEN, *supra*, at 427.

exposure to liver toxins would "degrade his liver's ability to function" in a "serious" way. J.A. 41. Dr. McGill understood from Chevron's job description and his own knowledge of the coker unit that Echazabal would be exposed to hepatotoxic chemicals and solvents as a plant helper. He concluded that exposure to those substances would "seriously endanger [Echazabal's] health." J.A. 39. "Small exposures over a long period of time would pose a health hazard for him." "[A] single event large exposure," such as "a ruptured pipe, a relief valve popping and venting, a fire, explosion or other emergency situation," could "by itself significantly injure him and potentially cause death." Moreover, Echazabal's "impaired liver would be less able to detoxify" exposure to chemicals that are "not specifically liver toxic," which also "carries the risk of serious injury or death." J.A. 39-40.

Echazabal's personal physician, Dr. Zelman Weingarten, wrote Chevron on January 10, 1996, that Echazabal's chronic active Hepatitis C had "been treated [for] extended periods with Interferon without clearance of the problem," but that Echazabal was not "contagious" and could "return to his usual duties at work." J.A. 95. Because Dr. Weingarten's letter did not address the advisability of Echazabal's being exposed to liver toxic chemicals, Dr. McGill called Dr. Weingarten. J.A. 175. Dr. Weingarten told Dr. McGill that Echazabal should not be exposed to hepatotoxins, and later confirmed in writing that such exposure, "of course, is recommended not to be the case." J.A. 98, 163-164, 175-176.

Chevron's medical director, Dr. T.L. Bridge, agreed with Dr. McGill's assessment that Echazabal could not safely work in the plant helper position. Dr. McGill then informed Chevron's human resources manager, William Saner, that if Echazabal were hired it should be subject to a work limitation: "No exposure to solvents or other liver toxic chemicals." Saner determined that such exposure is "a necessary and inseparable

part of the plant helper position," and accordingly withdrew Echazabal's conditional job offer. J.A. 32-33, 44-45, 56, 177.

Chevron sent a letter to Irwin asking that, because of Echazabal's medical condition, Irwin remove him "from our Refinery or place him in a position that eliminates his exposure to solvents/chemicals." J.A. 57-58, 178. Irwin consulted Dr. Charles Tang, who is Board Certified in occupational medicine and teaches that subject at the University of Southern California School of Medicine. J.A. 89-90, 179. After reviewing Echazabal's test results, Dr. Tang "concluded that exposure to liver toxins would harm and probably kill" him. J.A. 91, 179. Dr. Tang stated that Echazabal's "markedly elevated" liver enzymes showed that he had "a chronic destruction of his liver going on," and that there was a "high probability" that his "chronic illness" would be "severely worsened" by exposure to even "trace" or "small amount[s]" of hepatotoxins. J.A. 86-87, 92-93. After exposure, he explained, "some people have died of massive hepatic failure in a few hours, and [it] can also occur over months and years." J.A. 83. Accordingly, Dr. Tang concluded, "[i]f he's exposed to hepatotoxins, he should not be there." J.A. 92. Irwin then laid off Echazabal. J.A. 178-180.

D. Respondent's Suit And The District Court's Grant Of Summary Judgment To Chevron.

Echazabal filed this action in state court alleging that Chevron's withdrawal of his 1995 employment offer violated the ADA, the Rehabilitation Act, and California's Fair Employment and Housing Act, Cal. Gov't Code § 12940 ("FEHA"), and that Chevron intentionally interfered with Echazabal's contractual relations with Irwin. Echazabal sought punitive as well as actual damages for each claim. After Chevron removed the action to federal court, the district court (Baird, J.) granted summary judgment to Chevron on all of Echazabal's claims.

The district court held that under the ADA an employer may refuse to hire a person for a job that "poses a direct threat to the health of the employee himself." J.A. 184. It carefully reviewed the medical evidence and evidence concerning environmental conditions in Chevron's refinery and concluded that Chevron's employment decision rested on a reasonable, individualized medical judgment based on available evidence. J.A. 185. The court also found that "[a]ll the medical opinions which specifically contemplated Echazabal's employment in the position of plant helper, and which were relied upon and available to Chevron at the time of its decision * * *, regarded any exposure to hepatotoxic chemicals, including those to which Echazabal would be exposed in the position of plant helper, as posing a serious, immediate risk to him." *Ibid.*[6] The district court denied summary judgment to Irwin on Echazabal's similar discrimination claims against the contractor, but certified its ruling as to Chevron for immediate appeal. J.A. 198.

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[6] For the first time at the summary judgment stage, Echazabal presented declarations from two doctors retained for this litigation who disputed whether his high enzyme levels reflect liver damage or reduced liver function and whether exposure to substances at the refinery would endanger Echazabal. See J.A. 174-175, 186; but see *supra*, p. 7 n.4 & p. 9 n.5. The district court correctly held that the relevant inquiry under the ADA and its implementing regulations is whether Chevron reached a "reasonable medical judgment" based on "the best available objective evidence" at the time the employment decision was made. J.A. 186-187; see 29 C.F.R. § 1630.2(r). The court held that Echazabal's belated expert opinions, "even if correct, were not available to Chevron" when it withdrew its offer, and that "the evidence which was available to defendants supported [Chevron's] decisions." J.A. 186-187.

E. The Ninth Circuit's Divided Decision.

A divided panel of the Ninth Circuit reversed. Striking down the EEOC's contrary regulation, Judges Reinhardt and Bright concluded that the ADA's "qualification standards" defense does not apply to persons who pose a threat to their own health or safety but not to the health or safety of others in the workplace. J.A. 207-208. The majority also rejected Chevron's argument that Echazabal was not "qualified" to perform "essential functions" of the plant helper job because of the risks the job posed to him. J.A. 212.[7]

Dissenting, Judge Trott observed that the majority's "Pickwickian ruling" "leads to absurd results: a steelworker who develops vertigo can keep his job constructing high rise buildings; a power saw operator with narcolepsy or epilepsy must be allowed to operate his saw; and a person allergic to bees is entitled to be hired as a beekeeper." J.A. 215-216. It also has the "pernicious" effect of "dislodg[ing] longstanding laws mandating workplace safety." J.A. 215.

Judge Trott would have affirmed on two independent grounds. First, a person is not "qualified" to "perform the essential functions of the position he seeks when precisely because of his disability, those functions may kill him."

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[7] The Ninth Circuit vacated the grant of summary judgment for Chevron as to Echazabal's Rehabilitation Act and FEHA claims and remanded those claims for reconsideration because "the district court treated the substantive standards for liability under [the ADA and those two] statutes as identical." J.A. 212 n.12. In a separate opinion, the court reversed the grant of summary judgment for Chevron on Echazabal's state law interference with contract claim. J.A. 218-221. The court made clear, however, that its ruling as to that count also turned on its interpretation of the ADA. Chevron's letter to Irwin was not "justified" under the ADA, the court held, so Chevron had not made out the affirmative defense to tortious interference of justification. J.A. 221; see *infra*, p. 50 n.17.

Second, Chevron satisfied the "direct threat" qualification standards defense as set forth in EEOC regulations, to which Judge Trott would have deferred. J.A. 216. Judge Trott protested that the majority's decision will "require employers knowingly to endanger workers," imposing an "unconscionable" "moral burden" on employers. It will also result in "long, expensive, and unpredictable litigation" over "conflicting responsibilities under different labor laws," placing employers in considerable "legal peril." J.A. 216-217.

SUMMARY OF ARGUMENT

I. Acting pursuant to express congressional authority, the EEOC promulgated regulations in 1991 providing that an employer may defend against an ADA claim by showing that a job applicant would be placed at significant risk of serious harm to his own health or safety by carrying out essential functions of the job. Those regulations are a reasonable interpretation of the ADA and are entitled to deference.

EEOC's threat-to-self regulations comport with the plain meaning of section 12113(a), which provides that an employer may establish "qualification standards" that are "job-related and consistent with business necessity." A qualification standard requiring that every applicant be able to perform essential job tasks without endangering his health or life satisfies that test. Individuals who will become sick or die from doing the job cannot work on an ongoing and reliable basis, leaving employers with disruption and the expense of hiring and training replacements. Workplace injuries and deaths cause lower employee morale, reduced productivity, adverse publicity, diversion of company resources, and increased workers' compensation claims. Knowingly hiring an employee who will be harmed on the job also puts the employer at risk of enforcement actions for violations of OSHA and state worker safety laws, state tort claims, and state criminal prosecutions, which the employer has no assurance will be held to be

preempted by the ADA. Employers should not be placed in the dilemma of hiring workers who will be hurt or killed doing the job—something worker safety laws seek to prevent—or violating the ADA.

Nothing in the ADA prohibits the EEOC from recognizing personal safety as a valid qualification standard. In providing that a qualification standard "may include" a requirement that a person not pose a threat to others in the workplace, section 12113(b) merely provides one example of a valid standard, not (as the Ninth Circuit held) an exclusive definition of all permissible safety-related standards. This Court has held that the *expressio unius* maxim has no application to an inclusive provision like section 12113(b). Examples in the Committee Reports on the ADA show that Congress intended that the safety of an employee himself would continue to be a valid employment consideration, as it was under the Rehabilitation Act.

Uncontradicted evidence showed that Chevron satisfied the threat-to-self defense here. Chevron's written job requirements specified that plant helpers must have the ability to withstand exposure to hydrocarbons, solvents, and other liver-toxic chemicals. Chevron physicians experienced in industrial medicine, as well as Echazabal's own doctor, advised that Echazabal's liver disease would be exacerbated by exposure to hepatotoxins, and that he could be quickly killed by a leak. Chevron was entitled to rely on the reasonable conclusions of physicians available to it at the time it made its decision.

II. It is an independent ground for reversal that Echazabal did not prove that he was a "qualified individual" entitled to the protection of the ADA under section 12112(a). A "qualified individual" is defined in section 12111(8) as one who "can perform" the essential functions of the job. A person who will be made sick or be killed performing a job cannot perform that job on a continuing basis. The ordinary meaning of "qualified" does not encompass a person whose medical condition means

that he would be seriously endangered by the job and who, as a result, fails to meet the employer's written job requirements. In addition, Congress expressly intended that the concept of a qualified individual under the ADA would be the same as under Rehabilitation Act regulations and precedents. Cases interpreting the Rehabilitation Act, as well as the EEOC's regulations, establish that a disabled individual who cannot perform a job without facing serious injury is not qualified. Because Echazabal failed to produce any evidence, reasonably available to Chevron at the time it made its decision, that he could perform the plant helper job without posing a significant risk of serious injury to himself, he failed to establish that he was a qualified individual protected by the ADA.

ARGUMENT

I. THREAT TO SELF IS A DEFENSE TO LIABILITY UNDER THE ADA.

The Ninth Circuit erred when it held that Chevron could not refuse to hire respondent for a job that would seriously harm or kill him because threats to the life or health of job applicants themselves are not a defense to liability under the ADA. The court of appeals should have deferred to the EEOC's longstanding regulation recognizing a threat-to-self defense. The EEOC's regulation is consistent with the plain language and legislative history of the Act, reasonably balances employment opportunities for individuals with disabilities against the business needs of employers, comports with the prevailing legal and ethical norm that businesses must protect workers from harm, and plainly is entitled to judicial deference. There is no basis to suppose that Congress—counter to a century of legislation strengthening protections for worker safety—meant to force employers to hire disabled persons for jobs that would harm or kill them. The district court properly held that the EEOC's threat-to-self regulation, applied to the

uncontradicted facts here, mandates summary judgment for Chevron.

A. The EEOC's Threat-To-Self Regulations Are Entitled To Deference.

Title I of the ADA permits an employer to use "qualification standards" that screen out individuals with disabilities if "the standard * * * is shown to be job-related for the position in question and is consistent with business necessity." 42 U.S.C. § 12112(b)(6). Accordingly, section 12113(a) provides that it is a defense to a charge that a qualification standard discriminatorily denies a job to an individual with a disability that the standard "has been shown to be job-related and consistent with business necessity." The statute supplies one example of a valid qualification standard, providing that "[t]he term 'qualification standards' may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace." *Id.* § 12113(b). It defines a "direct threat" as "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." *Id.* § 12111(3).

As this Court has recognized, the ADA commanded the EEOC to "issue regulations * * * to carry out" the employment provisions of Title I within a year of the Act's adoption. 42 U.S.C. § 12116; see *Sutton* v. *United Air Lines, Inc.*, 527 U.S. 471, 478 (1999). Exercising that express authority, the EEOC promulgated regulations implementing Title I through notice-and-comment rulemaking. 56 Fed. Reg. 35726 (July 26, 1991). The EEOC's regulations interpret section 12113 to authorize an employer to use qualification standards that screen out individuals who in carrying out the essential functions of the job would pose a significant risk of serious harm to their own health or safety, as well as individuals who would pose a direct threat to the health or safety of others. See 29 C.F.R. § 1630.15(b)(2) ("The term 'qualification standard' may

include a requirement that an individual shall not pose a direct threat to the health or safety of the individual or others in the workplace"); *id.* § 1630.2(r) (a "direct threat" is "a significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation"); *id.* § 1630.2(q) ("qualification standards" are any "personal and professional attributes including * * * medical [and] safety * * * requirements" established by an employer as eligibility requirements for the job).

The EEOC's regulations also specify conditions that employers must satisfy to establish a section 12113 defense in any case in which qualification standards relate to health or safety, regardless of whether the relevant risk is to the employee or to others in the workplace. An employer's conclusion that a job applicant or employee poses a "direct threat" to self or others must rest on "an individualized assessment of the individual's present ability to safely perform the essential functions of the job," and that assessment must be "based on a reasonable medical judgment that relies on the most current medical knowledge and/or on the best available objective evidence." 29 C.F.R. § 1630.2(r). Factors relevant to that determination—the same factors this Court held are relevant to determining whether a direct threat exists under the Rehabilitation Act (*School Bd. of Nassau County* v. *Arline*, 480 U.S. 273, 288 (1987))—include "(1) [t]he duration of the risk; (2) [t]he nature and severity of the potential harm; (3) [t]he likelihood that the potential harm will occur; and (4) [t]he imminence of the potential harm." 29 C.F.R. § 1630.2(r).

This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer" (*Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)), the more so where, as here, the construction was adopted contemporaneously with passage of the statute and has been consistently maintained. See *Davis* v.

United States, 495 U.S. 472, 484 (1990) ("we give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use"); *Watt* v. *Alaska*, 451 U.S. 259, 272-273 (1981). The Court reaffirmed last Term that in a case such as this one, where "Congress delegated authority to the agency generally to make rules carrying the force of law" and the agency exercised that authority through the "formal administrative procedure" of notice-and-comment rulemaking, the "administrative implementation of a particular statutory provision qualifies for *Chevron* deference." *United States* v. *Mead Corp.*, 121 S. Ct. 2164, 2171 (2001). The EEOC's regulations implementing section 12113 are therefore entitled to deference unless they are at odds with "the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 843. Insofar as those regulations fill a gap left by the ADA because it "is silent or ambiguous with respect to the specific issue," a court may not substitute its own construction for the agency's if the agency's interpretation is "reasonable." *Id.* at 843-844; see *EEOC* v. *Commercial Office Prods.*, 486 U.S. 107, 115 (1988) ("EEOC's interpretation [of a statute] for which it has primary enforcement responsibility * * * need only be reasonable to be entitled to deference"); *Mead*, 121 S. Ct. at 2172.

Furthermore, because "existing language and standards from the Rehabilitation Act were incorporated into the ADA" (Statement of President George Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990)), the "administrative and judicial interpretation" of the Rehabilitation Act is essential to understanding the ADA. *Bragdon* v. *Abbott*, 524 U.S. 624, 645 (1998). As we discuss in detail in Part II, *infra*, EEOC's regulations and case law under section 504 of the Rehabilitation Act, 29 U.S.C. § 794, consistently interpreted that statute to disqualify from employment a disabled person who would be seriously harmed on the job. Congress in the ADA affirmatively embraced these Rehabilitation Act authorities. The fact that EEOC's regulations

interpreting section 12113 are consistent with regulations and case law interpreting the Rehabilitation Act, as the EEOC noted at the time of their adoption (56 Fed. Reg. at 35745), confirms that they are reasonable and entitled to deference.

The Ninth Circuit violated the most basic principles governing judicial review of agency action when it refused to defer to the EEOC's regulations. The EEOC's conclusion that not posing a threat to self is a proper "qualification standard" is fully consistent with section 12113(a)'s plain language. Contrary to the Ninth Circuit's faulty analysis, nothing in sections 12113(b) or 12111(3) casts any doubt on the EEOC's interpretation. The EEOC's regulations also comport with the ADA's legislative history.

B. The EEOC's Threat-To-Self Regulations Comport With The Plain Language Of Section 12113(a).

The "qualification standards" defense prescribed by section 12113(a) is general in scope. It applies to *all* "qualification standards," without restriction, that are both "job-related" and "consistent with business necessity." Section 12113(a)'s broad language on its face authorizes the EEOC's determination that appropriate qualification standards include "medical [and] safety" related "personal attributes" that are essential to avoiding serious harm on the job. 29 C.F.R. § 1630.2(q), (r).

A requirement that the individual be able to perform the essential functions of the particular job without risking serious injury or death is obviously "job-related." In addition, there are important business reasons why employers would not knowingly place an employee in harm's way. If the EEOC had concluded that it is *not* a "business necessity" to avoid significant and objectively documented risks of serious injury to self (see 29 C.F.R. § 1630.2(r)), that conclusion would have been arbitrary and capricious.

On Echazabal's and the Ninth Circuit's reading of the ADA —which no other court of appeals has accepted—an individual with a life-threatening allergy to inks and dyes could insist on a job printing banknotes at the Federal Bureau of Engraving and Printing even if he would not survive a week on the job (see *Patterson* v. *Summers*, 2000 WL 366113 (E.E.O.C. 2000)); a narcoleptic power saw operator could remain in her position, though she could maim or kill herself at any time (see 29 C.F.R. Part 1630, App.); a person subject to uncontrolled seizures could claim a job working "on a platform above fast-moving press rollers" and "next to exposed machinery that reached temperatures of 350 degrees" (see *Moses* v. *American Nonwovens*, 97 F.3d 446, 447-448 (11th Cir. 1996)); and a person who depends on a heart pacemaker could insist on a job working with high voltage electrical equipment that would cause the pacemaker to malfunction. See *Foreman* v. *Babcock & Wilcox Co.*, 117 F.3d 800, 803, 807-808 (5th Cir. 1997). Someone like Echazabal who has a serious, progressive medical disorder that would be made substantially worse by on-the-job exposures to chemicals, and who risks sudden death in the event of a large scale chemical leak, would be able to insist on taking that risk. Employers' business reasons for excluding such persons from jobs that will harm or kill them, however, are compelling.[8]

"[S]afety and efficiency," this Court has recognized, are "legitimate employment goals." *New York City Transit Auth.* v. *Beazer*, 440 U.S. 568, 587 n.31 (1979); see also *Fitzpatrick* v.

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[8] Echazabal's situation is not unique. One commentator has noted that individuals with "ischemic heart disease, such as angina pectoris and myocardial infarction, have an increased risk of serious cardiovascular illness when exposed to dinitrotoluene, carbon dioxide, methylene chloride, nitroglycerine, and carbon disulphide." Mark Rothstein, *supra*, 81 MICH. L. REV. at 1404. In Echazabal's case, of course, there are innumerable jobs that he could safely perform without exacerbating his potentially deadly medical condition.

City of Atlanta, 2 F.3d 1112, 1119, 1127 (11th Cir. 1993) ("protecting employees from workplace hazards * * * qualif[ies] as an important business goal"; "[m]easures demonstrably necessary to meeting the goal of ensuring worker safety are * * * 'required by business necessity'"). A legal duty to hire employees whose health would be compromised simply by doing the job, and who may even die as a result (as Echazabal could be quickly killed by a leak), would not only place employers in a moral dilemma but also threaten serious adverse practical consequences. Such individuals typically would not be able to perform the job on an ongoing, long-term, and reliable basis. Employers would then bear the costs and disruption of filling the gap left by sick or deceased workers, using "temporary workers, overtime," or "new workers" who require "training." Veronica Hellwig, *Integrating Disability Management to Help Improve the Bottom Line*, 15 COMPENSATION & BENEFITS MGMT. 43, 45 (1999).

The breakup of an existing team or crew and introduction of new employees also leads to a loss of efficiency, which can disrupt production schedules. Hellwig, *supra*, at 46. "As competitive pressures force organizations to operate more efficiently and with leaner workforces," these adverse consequences are magnified. *Ibid.*; see also Dwight Harshbarger, *Managing Safety from the Executive Suite*, 70 OCCUPATIONAL HEALTH & SAFETY 28, 33 (2001) (noting "the costs of replacement and retraining" and "the cost to a team culture when even one experienced and valued person leaves"). Efficient staffing is a modern business necessity, and it cannot be achieved if an employer is forced to hire individuals who will become sick from the effects of the job. See R. WAYNE MONDY, ROBERT M. NOE & SHANE R. PREMEAUX, HUMAN RESOURCE MANAGEMENT 396 (8th ed. 2002) (workplace injuries cause loss of "reputation," "difficulty in recruitment," strained "[e]mployee relations," difficulty maintaining a "stable workforce," and the need to pay "premium" compensation to attract staff).

Within the workplace, moreover, job-related illnesses or deaths cause "lower employee morale," which leads to "reduced productivity." Michael Blotzer, *OSHA Recordkeeping and Workers' Compensation*, 56 OCCUPATIONAL HAZARDS 67, 67 (1994). In the language of management experts, avoidable workplace illnesses and deaths have a highly negative impact on "motivational issues of alignment and focus of the organization, [employees'] sense of trust or lack thereof, and the discretionary effort of employees who know their organization is focused on their well-being," and they "diver[t management] from the achievement of other priority targets." Dwight Harshbarger, *supra*, at 28, 35.

Adverse publicity is another risk for businesses forced to hire workers who would be in danger on the job. A newspaper headline reading "Employee Dies of Chemical Poisoning" would be highly injurious to a company's reputation among customers, its employee relations, and the morale of its employees. See MARION K. PINSDORF, COMMUNICATING WHEN YOUR COMPANY IS UNDER SIEGE: SURVIVING PUBLIC CRISIS 255 (3d ed. 1999). A small employer could be driven out of business by such an event

Avoiding unnecessary workers' compensation claims is also a business necessity. Under state workers' compensation laws, job-related aggravation of a preexisting nonoccupational illness may be a basis for an award of compensation. See 3 LARSON'S WORKERS' COMPENSATION LAW 52-49 to 52-50 (2001) ("most courts * * * hold that when distinctive employment hazards act upon * * * preexisting conditions to produce a disabling disease, the result is [a compensable] occupational disease"); *Anderson* v. *Brinkhoff*, 859 P.2d 819 (Colo. 1993); *Sandusky* v. *Workmen's Comp. Appeal Bd.*, 487 A.2d 1019 (Pa. Commw. 1985); *Smith* v. *I.R. Equip. Corp.*, 400 N.Y.S.2d 900 (App. Div. 1977). Workers' compensation and other insurance claims attributable to workplace illness can in turn have a negative effect on "the insurance rating of the company" or even lead to

a "total loss of insurability." Steven Van Yoder, *Retailers Target Hidden Costs of On-the-Job Injuries*, STORES 62, 62 (Dec. 1999).

Workers' compensation claims may be the least significant of the legal risks facing a business that hires workers who endanger themselves. As Judge Trott pointed out, "law books * * * overflow with statutes and rules designed by representative governments to protect workers from harm." J.A. 215. Knowingly putting workers in jobs that will harm them may result in administrative fines for violation of safety laws, civil tort claims for huge amounts of actual and punitive damages, and criminal prosecution carrying the risk of fines against the enterprise or imprisonment of its officers. Even if liability is avoided in such actions, they can inflict years of expensive and unsettling litigation and adverse publicity for the business.

Substantial legal risks arise from the federal Occupational Safety and Health Act, which imposes a general duty on every employer to "furnish to *each* of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees." 29 U.S.C. § 654(a) (emphasis added). The Occupational Health and Safety Administration has explained that this obligation applies to the employment of disabled persons. See OSHA, Standards Interpretation, Employment of Individuals with Disabilities (Aug. 27, 1997), at www.osha-slc.gov/OshDoc/Interp_data/I19970827.html ("OSHA's policy is [that] if [employees] can perform their job functions *in a manner which does not pose a safety hazard to themselves* or others, the fact they have a disability is irrelevant") (emphasis added). While it is clear that OSHA safety obligations trump "application of the ADA as a matter of law" (*Albertsons, Inc.* v. *Kirkingburg*, 527 U.S. 555, 573 (1999); 29 C.F.R. § 1630.15(e)), the precise nature of OSHA obligations in a particular case is often uncertain. See 29 C.F.R. Part 1630, App., Guidance on Section 1630.15(e) (describing

strict limitations on the ADA defense of compliance with OSHA). That leaves employers at risk of having to defend against OSHA complaints if they knowingly employ workers in jobs that are dangerous for them, or to defend against ADA claims if they refuse to do so.[9]

Also of great concern to employers is the risk that employing a disabled person who will be harmed on the job will result in state administrative, tort, or criminal actions. See Deborah Bender, *Echazabal v. Chevron: A Direct Threat to Employers in the Ninth Circuit*, 76 WASH. L. REV. 859, 886 (2001) (examining an employer's legal risks and concluding that "[e]nsuring the personal safety of employees is a business necessity"). California laws governing Chevron's El Segundo refinery, for example, provide that "[n]o employer shall * * * permit *any* employee to go or be in any employment or place of employment which is not safe and healthful." Cal. Labor Code

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[9] A basic principle of health and safety regulation under the OSH Act is that only the "feasible" elimination of substantial risks of harm is required; the Act "was not designed to require employers to provide absolutely risk-free workplaces." *Industrial Union*, 448 U.S. at 641. OSHA exposure standards therefore "will not provide a completely risk-free work environment for all workers," and in particular, workers who are "highly susceptible" to toxins at levels below those regulated by OSHA "will not be safeguarded by the exposure standards." David Mahoney & Jeffrey Kendall, *OSHA's Medical Surveillance and Removal Programs*, 42 U. PITT. L. REV. 779, 780-781 (1981). Nevertheless, an employer who *knows* that a worker is hypersusceptible to toxic exposures below OSHA-mandated levels because of a pre-existing medical condition may be at risk under OSHA's general duty clause. See 29 U.S.C. § 654(a) (imposing obligation to avoid "recognized hazards" to workers); *Whirlpool Corp.* v. *Marshall*, 445 U.S. 1, 13 (1980). In this case, OSHA's standards indicate that many of the chemicals in Chevron's refinery are dangerous to persons with liver disease, creating further legal risk. See *supra*, p. 7 n.4.

§ 6402 (emphasis added). An employer is therefore required to do everything "reasonably necessary to protect the life, safety, and health of employees." *Id.* § 6403; see also *id.* § 6406(b). If it appears that a job "is not safe or is injurious to the welfare of *any* employee," the enforcement agency is authorized to take administrative action against the employer. *Id.* § 6409.5 (emphasis added). Violation of these employee-protection duties may also result in a wrongful death or other tort suit against the employer by the worker or his family, seeking an award of actual and punitive damages. *E.g.*, *Harris* v. *Chisamore*, 85 Cal. Rptr. 223, 225 (Ct. App. 1970) (violation of the Labor Code's safety provisions "gives rise to a rebuttable presumption of negligence"); *Jamison* v. *GSL Enters., Inc.*, 711 N.Y.S.2d 413, 415 (App. Div. 2000) (wrongful death action against employer based on breach of statutory duty to protect the safety of "all persons employed" and common law negligence); *Russell* v. *Bush & Burchett, Inc.*, 2001 WL 1524554, at *2 (W. Va. 2001) (personal injury action against employer who knew of dangerous condition).[10]

In addition, an employer who violates state worker safety laws risks criminal sanctions, including fines and imprisonment. See Cal. Labor Code §§ 6423, 6432 (a knowing or negligent violation of the Labor Code that results in a "substantial probability that death or serious physical harm could result" is a misdemeanor). If an employee like Echazabal died as a result of workplace chemical exposures, the employer

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[10] There are a myriad of statutory and common law exceptions to the general principle that workers' compensation is the exclusive remedy for workplace injuries. See, *e.g.*, 2 DAN B. DOBBS, THE LAW OF TORTS 1105-1106 (2001) (the availability of workers' compensation often does not bar a tort suit alleging intentional or reckless conduct by the employer that is substantially certain to cause injury or death); John Burnett, *The Enigma of Workers' Compensation Immunity*, 28 FLA. ST. U. L. REV. 491, 498-500 (2001) (managerial and supervisory workers have no immunity for gross negligence).

could even be convicted of involuntary manslaughter if a jury found that it had acted "without due caution and circumspection" in a manner "which might produce death." Cal. Penal Code § 192(b); see, *e.g.*, *Granite Constr. Co.* v. *Superior Court*, 197 Cal. Rptr. 3, 4 (Ct. App. 1983) (upholding prosecution for manslaughter in death of employee). Similar prosecutions have occurred around the country. See, *e.g.*, *Illinois* v. *Chicago Magnet Wire Corp.*, 534 N.E.2d 962, 966-967 (Ill. 1989) (upholding state criminal indictments of corporate officials for recklessly exposing workers to the risk of "serious physical injury or death" from poisonous substances); *People* v. *Pymm*, 563 N.E.2d 1 (N.Y. 1990) (upholding prosecution of corporate officers for state criminal offenses arising from mercury contamination in the workplace).

An employer faced with the choice between violating the ADA and risking criminal and civil sanctions under state law could take little comfort from the Ninth Circuit's casual suggestion that state law would be preempted by the ADA. J.A. 207. Many cases have held that federal worker protection laws do not preempt state laws, especially state criminal laws. See, *e.g.*, *Chicago Magnet Wire Corp.*, 534 N.E.2d at 966-968 (criminal charges for exposing workers to toxins were not preempted by OSHA even though "the conduct sought to be regulated * * * is identical"; the power to prosecute criminally and to regulate health and safety are "'primarily, and historically' * * * matter[s] of local concern"); *Pymm*, 563 N.E.2d at 2 (OSHA did not preempt criminal prosecution); *People* v. *Hegedus*, 443 N.W.2d 127, 131-139 (Mich. 1989) (OSHA did not preempt state involuntary manslaughter prosecution). Indeed, this Court has recognized a "presumption that state or local regulation of matters related to health and safety is not invalidated under the Supremacy Clause." *Hillsborough County* v. *Automated Med. Labs., Inc.*, 471 U.S. 707, 715 (1985). Litigants opposing preemption surely would argue that employers *could* comply with both state and federal law by placing susceptible individuals in dangerous jobs but taking

steps to protect them that would not be required by the ADA because they are not "reasonable accommodations." The employer's preemption challenge would have to be pursued through state courts traditionally hostile to federal preemption claims. No rational employer could assume that it would, through this "long, expensive, and unpredictable litigation road," avoid the civil and criminal state law consequences of knowingly putting an employee in harm's way. J.A. 217.[11]

No less important than operational burdens and legal risk is the ethical quandary faced by employers required by law to place employees in jobs that would cause them serious harm. Many employers had "excellent safety programs years before OSHA existed" because they believed worker safety is a moral and "[s]ocial responsibility." MONDY, NOE & PREMEAUX, *supra*, at 396. By "requir[ing] employers knowingly to endanger workers," as Judge Trott observed, the Ninth Circuit's rule imposes an "unconscionable" "moral burden" on employers. J.A. 216-217; see Robert Eckhardt, *The Moral Duty to Provide Workplace Safety*, PROFESSIONAL SAFETY 36 (Aug.

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[11] Because Title VII and the ADA prescribe different obligations and defenses, this Court's suggestion in *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187, 208-211 (1991), that state tort law that impeded Title VII's goals would be preempted has no application here. See J.A. 207. The Ninth Circuit's heavy reliance on the preemption discussion in *Johnson Controls* also ignores the fact that states may bring criminal prosecutions for endangering worker safety and that state courts routinely hold that those prosecutions are *not* preempted. Risks of criminal prosecution were not at issue in *Johnson Controls*. Regardless of whether avoiding the monetary costs of paying damages judgments is properly considered a business necessity (see 499 U.S. at 210), avoiding criminal prosecution *is* such a necessity. Furthermore, businesses legitimately need to avoid the disruption to operations, uncertainty, and bad publicity that are the inevitable result of civil or criminal suits alleging that the business is responsible for employee deaths.

2001). This Court has held that the state's concern to preserve human life outweighs the individual's "self-sovereignty" interest in assisted suicide. *Washington* v. *Glucksberg*, 521 U.S. 702, 724, 731-732 (1997). Likewise, the moral concerns of employers asked to abet a worker's irrevocable decision to forfeit health and life for temporary economic benefits should not be ignored. See *id.* at 740-741 ("life is far too precious to allow * * * complete autonomy in making a decision to end that life") (Stevens, J., concurring); *Cruzan* v. *Director, Missouri Dep't of Health*, 497 U.S. 261, 293 (1990) (unlawful suicide includes "refusing to take appropriate measures necessary to preserve one's life") (Scalia, J., concurring).

Given the plethora of significant adverse effects that businesses suffer as a result of workplace illness, injury, or death, the EEOC's interpretation of the term "business necessity" to avoid placing workers in jobs that would destroy their health or kill them is undoubtedly correct. No plausible reading of section 12113(a) could fail to include as a valid qualification standard the absence of significant threats to job applicants and employees themselves. But even if subsection (a)'s "business necessity" requirement did not compel the EEOC's threat-to-self regulation, that would only mean that Congress did not say one way or the other in section 12113(a) whether threat to self is a proper qualification standard. "Against this background of legislative silence," the EEOC's "interpretative regulation [clearly] constitutes a permissible gloss on the Act." *Whirlpool Corp.*, 445 U.S. at 11. On either analysis, the EEOC's threat-to-self regulations are entitled to *Chevron* deference and should be upheld.

C. No Other Provision Of The ADA Precludes A Threat-To-Self Defense.

Contrary to the Ninth Circuit's conclusion, section 12113(b) in no way limits the generality of the section 12113(a) defense so as to exclude from its scope qualification standards requiring

that individuals not pose a threat to self. In specifying in subsection (b) that "[t]he term 'qualification standards' *may include* a requirement that an individual shall not pose a direct threat to the health or safety of *other individuals* in the workplace," Congress merely provided *one example* of an acceptable qualification standard. Indeed, Congress described subsection (b) "as a subset of [the broader qualification standards] defense." H.R. Rep. No. 101-485, Pt. 2 (1990), 1 House Comm. on Education and Labor, 101st Cong., 2d Sess., Legislative History of Pub. L. 101-336, Americans with Disabilities Act 423 (Comm. Print 1991) ("Leg. Hist."). Subsection (b) removes any doubt that an employer may require that an applicant or employee not pose "a significant risk to the health or safety of others that cannot be eliminated by reasonable accommodation." 42 U.S.C. § 12111(3). It shows that Congress understood workplace health and safety issues to be "job-related" and matters of "business necessity." By its plain terms, however, it *does not limit* the relevance of health and safety to preserving the well-being only of *others* in the workplace.[12]

This Court's precedents confirm this reading. As this Court recently observed, section 12113(b) on its face is "a permissive provision." *Albertsons*, 527 U.S. at 569; see also *Christensen* v. *Harris County*, 529 U.S. 576, 587-588 (2000) ("may include" is "plainly permissive"). By using the term "may include,"

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[12] That Congress singled out direct threats to other people for special mention in section 12113(b) is consistent with its adoption of another special provision that permits an employer to deny "a job involving food handling" to "an individual [who] has an infectious or communicable disease that is transmitted to others through the handling of food." 42 U.S.C. § 12113(d). Congress intended by its explicit treatment of threat to others in section 12113(b)—as it expressly intended by its adoption of the food handler provision—to "reassure the American public" that its safety was not being compromised. H.R. Conf. Rep. No. 101-596 (1990), 1 Leg. Hist. 68.

Congress signaled that what followed was not an exhaustive statement of permissible safety-related qualification standards, but merely an example of one valid standard. See *Federal Land Bank* v. *Bismarck Lumber Co.*, 314 U.S. 95, 100 (1941) ("the term 'including' is not one of all-embracing definition, but connotes simply an illustrative application of the general principle"); *United States* v. *New York Tel. Co.*, 434 U.S. 159, 169 (1977) (a phrase introduced by the words "to include" does "not restrict or purport to exhaustively enumerate"); *Chickasaw Nation* v. *United States*, 122 S. Ct. 528, 532 (2001) (the word "including" introduces an "illustrative list" without "any suggestion that Congress intended [it] to be complete").

Congress's carefully differentiated use of the verbs "to mean" and "to include" in the ADA shows that its choice of words in section 12113(b) was not accidental. Employing the words in their plain and ordinary sense, Congress in the ADA used the verb "to mean" when it intended to provide an exhaustive definition and the verb "to include" when it intended to furnish a non-exclusive illustration. Thus, Congress provided that "[t]he term 'disability' means" being impaired, having a record of impairment, or being regarded as having an impairment. 42 U.S.C. § 12102(2); see also *id.* §§ 12102(3), 12111(1)-(8) (each defining what a term used in the Act "means"). This Court has held that Congress thereby intended to define exhaustively the ways in which a person may be determined to have a "disability" for purposes of the Act. See *Sutton*, 527 U.S. at 478 ("to fall within this definition one *must*" fit into one of the three listed categories) (emphasis added); *Beck* v. *Prupis*, 529 U.S. 494, 497 n.2 (2000) (term "means" introduces an "exhaustive" definition).

In contrast, where a categorical definition would have been too inflexible, Congress used the verb "to include." Thus, unable to foresee every aid or accommodation that might enable a disabled person to do a job—given the enormous variety of jobs and wide range of disabilities—Congress defined those

concepts non-restrictively. The term "auxiliary aids and services," Congress provided, "includes" interpreters, readers, and new equipment. 42 U.S.C. § 12102(1). "Reasonable accommodation," it stated, "may include" making facilities accessible, job restructuring, modified work schedules, and job reassignment. *Id.* § 12111(9). By explaining what reasonable accommodation "may include," Congress intended to provide "illustrations of accommodations" and "general guidance"—"not * * * to be exhaustive." S. Rep. No. 101-116 (1990), 1 Leg. Hist. 129; see also H.R. Rep. Pt. 2, 1 Leg. Hist. 330 (definition of reasonable accommodation "sets forth examples").

This sort of deliberate "distinction in th[e] use" of "[t]he terms 'means' and 'includes'" shows that "these words [have] a different sense." *Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934). "[W]here 'means' is employed, the term and its definition are to be interchangeable equivalents," whereas "the verb 'includes' imports a general class, some of whose particular instances are those specified in the definition." *Ibid.* "[R]ead as a whole," the ADA leaves no doubt that Congress reserved the term "means" for exhaustive definitions and used the terms "includes" or "may include" to introduce non-exclusive illustrations. *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991); see *New York Tel. Co.*, 434 U.S. at 169 n.15 ("Where the definition of a term * * * was intended to be all inclusive, it is introduced by the phrase 'to mean' rather than 'to include'"). To ignore this distinction *throughout* the ADA would be a singular disservice to the disabled, turning illustrations of aids and accommodations (for example) into exhaustive lists limiting employers' obligations. See 42 U.S.C. §§ 12102(1), 12111(9). To ignore it solely in the case of section 12113(b) would fly in the face of the "'basic canon of statutory construction'" that "'identical terms within an Act bear the same meaning.'" *Reno* v. *Koray*, 515 U.S. 50, 58 (1995).

Citing none of the relevant authorities, paying no heed to the nonexclusive nature of the phrase "may include," engaging in no analysis of Congress's differential use of the terms "means" and "include," and seemingly unaware of how its interpretation of the term "may include" would alter the effect of other important provisions of the Act, the Ninth Circuit held that section 12113(b) implicitly precludes a threat-to-self defense, relying on the canon of construction *expressio unius est exclusio alterius*, "*i.e.*, the expression of one is the exclusion of others." J.A. 201; *United States* v. *Wells Fargo Bank*, 485 U.S. 351, 357 (1988). According to the Ninth Circuit, "by specifying only threats to 'other individuals in the workplace,' the statute makes it clear that threats to other persons—including the disabled individual himself—are not included within the scope of the defense." J.A. 201.

The Ninth Circuit's use of the *expressio unius* maxim does violence to the language of the statute. That canon "serves only as an aid in discovering the legislative intent when that is not otherwise manifest." *United States* v. *Barnes*, 222 U.S. 513, 519 (1912). It cannot override plain language making clear that Congress intended a specified example to be illustrative, not exhaustive. See *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 703 (1991); *Burns* v. *United States*, 501 U.S. 129, 136 (1991); 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.23, at 316 (6th ed. 2000) ("When 'include' is utilized, it is generally improper to conclude [using the *expressio unius* inference] that entities not specifically enumerated are excluded"). Here, the maxim may not properly be applied to convert an explicitly non-restrictive example of one kind of permissible safety-based qualification standard into the only permissible safety-based qualification standard; "[t]he language of the statute is too strong to bend" in that way. *Chickasaw Nation*, 122 S. Ct. at 532.

The Ninth Circuit was likewise incorrect in asserting that the ADA's definition of "direct threat" as "a significant risk to

the health or safety of others" undermines the EEOC's interpretation. 42 U.S.C. § 12111(3); J.A. 201. The term "direct threat" appears nowhere in section 12113(a) and therefore obviously does not limit the generality of the qualification standards defense. Nor does this statutory definition preclude the EEOC in its regulations from using the term "direct threat" more expansively to encompass all safety-related instances of the business necessity defense, whether they involve threat to self or to others. Rather than treat threat to self and threat to others separately in its regulations, the EEOC simply elected to subject *all* medical and safety qualification standards to the same substantive and evidentiary rules, using the "direct threat" rubric. 29 C.F.R. §§ 1630.2(r), 1630.15(b)(2). That decision of convenience by the agency Congress charged with implementing these provisions—a decision that avoids a potentially confusing proliferation of rules that would overlap, since some individuals with medical conditions that create safety risks pose a threat to others as well as to themselves—is reasonable and entitled to deference under *Chevron*.[13]

D. The EEOC's Threat-To-Self Regulations Are Consistent With The ADA's History And Design.

The EEOC pointed out when it promulgated its regulations in 1991 that a threat-to-self defense is "consistent with the legislative history of the ADA." 56 Fed. Reg. at 35730, 35745. Congress aimed in the ADA to bar employers from making employment decisions about persons with disabilities based on "generalizations, misperceptions, ignorance, irrational fears,

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[13] Because of the generality of section 12113(a) and the nonexclusive nature of section 12113(b), the alternative to deference here is not, as the Ninth Circuit supposed, a scheme in which threat to self is no defense at all. Rather it is a scheme in which threat to self is analyzed under the general § 12113(a) business-necessity defense rather than under the § 12113(b) direct-threat defense and the EEOC's demanding direct-threat regulations.

patronizing attitudes, [and] pernicious mythologies." S. Rep., 1 Leg. Hist. at 125; see H.R. Rep. Pt. 2, 1 Leg. Hist. at 306 (the ADA targeted "refusal to hire based on presumptions, stereotypes and myths about job performance, safety, insurance costs, absenteeism, and acceptance by others"). Congress did not, however, bar the application of legitimate, safety-based qualification standards to disabled persons on an individualized basis. Thus, while Congress intended to prohibit an employer from adopting "overprotective rules and policies" (42 U.S.C. § 12101(a)(5)) and from refusing to hire "based on generalized fears about the safety of the applicant" that rested "on averages and group-based predictions," Congress was equally clear that "individualized assessments" about employee safety are permissible. S. Rep., 1 Leg. Hist. 126; see H.R. Rep. Pt. 2, 1 Leg. Hist. 331. The EEOC's regulations comply with these aims, limiting the use of personal safety concerns as a disqualifying factor to cases of "business necessity" when an individual would face a "significant risk of substantial harm," as determined by an "individualized assessment" based on a "reasonable medical judgment." 29 C.F.R. § 1630.2(q).

In contrast to the Ninth Circuit, which simplistically labeled the EEOC's threat-to-self regulations "paternalistic" and therefore impermissible (J.A. 204-205), Congress carefully distinguished between mere "paternalistic concerns for the disabled person's own safety" and "job selection procedures [that are] 'job-related and consistent with business necessity.'" H.R. Rep. Pt. 2, 1 Leg. Hist. at 345. Three examples in the House Report from the Committee on Education and Labor show beyond question that Congress understood that a *real* and *significant* risk to an applicant's or employee's safety in doing the particular job falls into the latter category.[14]

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[14] The House Education and Labor Committee was "a key committee" with responsibility for the ADA because it "had jurisdiction over the Rehabilitation Act" on which the ADA was modeled and was the

First, the Committee drew a distinction between an employment decision "based on paternalistic views about what is best for a person with a disability"—which is impermissible—and a "physical or mental employment criterion * * * used to disqualify a person with a disability" that "has a direct impact on the ability of the person to do their actual job duties *without imminent, substantial threat of harm*"—which is proper. H.R. Rep. Pt. 2, 1 Leg. Hist. at 347 (emphasis added). That the "threat of harm" Congress had in mind here is a threat to self is shown by the Committee's clarification in the next sentence that "*[g]eneralized* fear about risks from the employment environment, *such as exacerbation of the disability caused by stress*, cannot be used by an employer to disqualify a person with a disability." *Ibid.* (emphasis added). The clear import of this passage is that an individualized and sufficiently serious "exacerbation of [a preexisting] disability" *could* amount to an "imminent, substantial threat of harm" that would disqualify the applicant from employment.[15]

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venue the "party leaderships [had selected] to negotiate a refined ADA that would garner broad support." Chai Feldblum, *Medical Examinations and Inquiries Under the Americans with Disabilities Act*, 64 TEMP. L. REV. 521, 529 n.58 (1991).

[15] Because Congress in the ADA made a sharp distinction between "paternalism" and the "business necessity" to exclude a disabled person from a particular job that threatens the individual with serious harm, the Ninth Circuit's observation that this Court interprets Title VII "to prohibit paternalistic employment policies" is beside the point. J.A. 204, citing *Dothard* v. *Rawlinson*, 433 U.S. 321 (1977), and *International Union* v. *Johnson Controls, Inc.*, 499 U.S. 187 (1991). In *Dothard*—which held that women *may* be excluded from contact positions in a high-security male prison—this Court stated that "it is impermissible under Title VII to refuse to hire [on] the basis of stereotyped characterizations of the sexes." 433 U.S. at 333. Chevron's refusal to hire Echazabal was based not on stereotypes, but

The Committee also explained that while a candidate "may not be excluded * * * solely on the basis of an abnormality on an x-ray," he or she may be excluded "if the examining physician found that there was high probability of substantial harm if the candidate performed the particular functions of the job." H.R. Rep. Pt. 2, 1 Leg. Hist. at 346. Because many lung abnormalities detectable by x-ray would involve conditions that carry no threat to others but that could be exacerbated by some work conditions (for example, lung cancer or emphysema), this example obviously includes threats solely to self.

Finally, in explaining that "the assessment that there exists a high probability of substantial harm must be strictly based on valid medical analyses," the Committee gave as an example of inadequate medical documentation "back x-rays which reveal anomalies in asymptomatic persons," because these "usually have largely low predictive value." H.R. Rep. Pt. 2, 1 Leg. Hist. at 346. Because back disorders cause great pain and discomfort to the individual, but very rarely put others at risk, this example again demonstrates that Congress intended that personal safety may be a valid employment consideration.

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on individualized consideration of Echazabal's medical condition. *Johnson Controls* held that an employer violated Title VII when it barred women from jobs working with lead to protect their fertility and fetuses. Unlike serious liver disease, chemical injuries to fertility and fetuses do not interfere with a person's ability to perform the job. In addition, singling out women was blatantly discriminatory because lead also has a "debilitating effect" on male fertility; another federal statute prohibited discrimination based on the potential for pregnancy; and OSHA had concluded that there was no scientific basis for excluding women of childbearing age from jobs involving lead exposure. 499 U.S. at 198-199, 208. None of these factors is present here. The employment decision here rested on specific, individualized medical advice to Chevron that exposure to toxins in its refinery would exacerbate Echazabal's liver condition and probably kill him.

That this was Congress's intent is confirmed by the explanation in the House Judiciary Committee's report that an employer would have an obligation to provide a reasonable accommodation to protect the health of "a person * * * employed as a painter [who] is assigned to work with a unique paint which caused severe allergies, such as skin rashes or seizures," such as by reassignment to a different job. H.R. Rep. Pt. 3, 1 Leg. Hist. 469. Clearly Congress, consistent with its development of worker-safety laws such as the OSH Act, remained concerned in the ADA that job applicants not be placed in danger.

The Ninth Circuit's contention (J.A. 202) that Congress made no reference to threats to disabled persons themselves in the ADA's legislative history is therefore erroneous. The House Report makes clear that an employer may consider the risk of harm to self. That the legislative history uses the term "direct threat" only in connection with harm to others (*ibid.*) is no more illuminating than the inclusion of a direct-threat-to-others defense in section 12113(b), for the same reasons discussed in Part I.C, *supra*. As the United States has pointed out, the Ninth Circuit's reliance on that usage inappropriately applies "the *expressio unius* canon to the legislative history." Br. for the United States as *Amicus Curiae* in Support of Ptn. for Cert. 13; see H.R. Rep. Pt. 3, 1 Leg. Hist. at 485 (a qualification standard "may also include" a requirement that the individual pose no threat to others).

The Ninth Circuit placed great weight on a single floor statement by Senator Kennedy, who was one of 34 Senate consponsors of the law. Chai Feldblum, *supra*, 64 TEMP. L. REV. at 526. Senator Kennedy stated that "employers may not deny a person an employment opportunity based on paternalistic concerns regarding the person's health." J.A. 203 (quoting 136 Cong. Rec. 17377 (1990)). Senator Kennedy gave as an example that "an employer could not use as an excuse for not hiring a person with HIV disease the claim that the

employer was simply 'protecting the individual' from opportunistic diseases to which the individual might be exposed. That is a concern that should rightfully be dealt with by the individual, in consultation with his or her private physician." *Ibid.*

The example Senator Kennedy gave of a paternalistic fear that a person with HIV would contract opportunistic infections —a generalized and speculative fear that could bar the worker from *any* job—is far removed from the threat-to-self defense set forth in the EEOC's regulations, which recognize the business necessity of excluding persons who are found after careful, individualized medical inquiry to be at real and substantial risk from a particular work environment. To the extent that Senator Kennedy's statement suggests (if at all) that employers have no business necessity to deny employment to such persons, it is at odds with the language of the ADA and with the more authoritative committee reports discussed above. Such personal and "frankly partisan statements about the meaning of" the qualification standards defense "cannot plausibly be read as reflecting any general agreement." *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 262 (1994); see *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 311 (1979) ("The remarks of a single legislator, even the sponsor, are not controlling").

The court of appeals' interpretation of the ADA defeats Congress's avowed purpose "to bring persons with disabilities into the economic and social mainstream of American life." H.R. Rep. Pt. 2, 1 Leg. Hist. at 295. The goal of ensuring that persons with disabilities enjoy "full participation" in the workplace on an ongoing basis is defeated if they take jobs that expose them to serious harm, even death. 42 U.S.C. § 12101(a)(8). In outlawing sweeping paternalistic judgments while allowing employers a threat-to-self defense "to assure * * * an applicant's actual ability" to do and keep doing the job (H.R. Rep. Pt. 2, 1 Leg. Hist. at 344), Congress and the EEOC have protected disabled individuals from discrimination based

on "stereotypic assumptions" and given them every "opportunity to compete on an equal basis," to enjoy "independent living," and to achieve "economic self-sufficiency," while also meeting the needs of American business. 42 U.S.C. § 12101(a)(7)-(9). Respondent would destroy that careful balance.

E. Chevron Satisfied The Requirements Of The Threat-To-Self Defense.

Carefully applying section 12113 and the EEOC's elaboration of the threat-to-self defense in 29 C.F.R. § 1630.2(r), the district court granted summary judgment to Chevron. The court held that "undisputed" record evidence showed that the company had exercised a high "degree of diligence" in making an "individualized assessment" of the threat the plant helper job posed to Echazabal, acting "reasonably on the basis of the medical evidence * * * before it," which was the "best available objective evidence." J.A. 185, 188-189. That evidence included the judgments of three Chevron doctors experienced in industrial medicine, who concluded on the basis of Echazabal's medical history and test results that he would be harmed or killed by exposure to liver toxins; the recommendation of Echazabal's own physician that "of course" Echazabal should not be exposed to hepatotoxins; and the description in Chevron's job summaries, along with the responsible employees' own knowledge, of the toxic chemicals to which a plant helper would be exposed. J.A. 172-177, 185, 189; *supra*, pp. 8-11. The "deliberative process" in which Chevron engaged refutes "any argument that [it] based its decision as to qualifications on stereotypes about disability." *EEOC* v. *Amego, Inc.*, 110 F.3d 135, 146 (1st Cir. 1997).

The district court correctly held that declarations from a toxicologist and a liver specialist that Echazabal obtained in connection with this litigation in November 1997, nearly two years after the events at issue, raised no genuine issue of

material fact. J.A. 186-187. Those declarations, which questioned the uniform conclusion of Chevron's doctors that Echazabal's liver enzyme tests showed reduced liver function and disputed that Echazabal would in fact have been endangered by the plant helper job, were not reasonably available to Chevron when it made its decision.[16] All the medical opinions specific to the plant helper job that *were* "relied upon and available to Chevron at the time of its decision" concluded that "any exposure" to the hepatotoxins in the refinery would pose a "serious" and "immediate" risk to Echazabal. J.A. 185; *supra*, pp. 8-11; *Bragdon*, 524 U.S. at 649, 662 ("significant risk must be determined from the standpoint of" the employer "as of the time the [employment] decision is made").

In these circumstances Chevron was entitled to base its decision on the opinions of its doctors that Echazabal would be seriously harmed or killed by performing the plant helper job. If post-hoc opinions prepared for purposes of litigation were enough to create a triable issue of fact as to whether Chevron relied on "a reasonable medical judgment," employers could never safely rely on the judgments of internists or physicians practicing occupational medicine. They instead would in every case have to seek out the opinions of other practitioners in the particular medical specialty or sub-specialty at issue before making a decision to deny employment based on a threat to self

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[16] The views of plaintiff's doctors retained for this litigation are in any event contradicted by the NIH, which has explained that albumin and prothrombin tests show no change until late-stage liver disease and that enzyme levels like Echazabal's are a sign of severe disease; by the CDC's NIOSH, which has stated that specific chemicals found in the refinery are liver toxic; and by authoritative medical textbooks. See *supra*, p. 7 n.4 & p. 9 n.5; *Bragdon*, 524 U.S. at 650 (attaching "special weight and authority" in the direct threat inquiry to "the views of public health authorities," including the "CDC, and the National Institutes of Health").

(or others). Employers have no such obligation. They may rely on the reasonable opinions of competent physicians, including company-employed or retained physicians or the employee's own physician. See, *e.g.*, *Knapp* v. *Northwestern Univ.*, 101 F.3d 473, 484 (7th Cir. 1996) (university was entitled to bar student with heart defect from basketball team; "medical determinations of this sort are best left to team doctors and universities as long as they are made with reason and rationality * * * regardless whether conflicting medical opinions exist"); *Lowe* v. *Alabama Power Co.*, 244 F.3d 1305, 1308 (11th Cir. 2001) ("The key inquiry is whether the employer made a reasonably informed and considered decision"; "justifiable reliance on a physician's diagnosis" is enough); *Foreman*, 117 F.3d at 803 (relying on medical restriction imposed by employee's physician).

The ADA is designed to provide disabled persons with equal opportunities in the workplace. That goal is best served by legal rules that encourage applicants and employees to present medical evidence to the employer in a timely manner so that the employer may take it into consideration in making a decision. Permitting an applicant like Echazabal to remain silent as to his qualification at the time his employment is under consideration, only to produce doctors with different views in the course of an ADA lawsuit years later, would defeat the purposes of the Act and unfairly punish employers for reasonably relying on medical expertise.

II. A PERSON WHO POSES A SERIOUS THREAT TO SELF IN PERFORMING ESSENTIAL FUNCTIONS OF A JOB IS NOT A "QUALIFIED INDIVIDUAL."

This Court need not go beyond the section 12113 "qualification standards" defense to decide this case in Chevron's favor. However, whether an individual with a disability is qualified for a job is relevant not only to an employer's "qualification standards" defense, but also to the

question whether the individual is "a qualified individual with a disability" within the coverage of the ADA in the first place. Only a "qualified individual with a disability"—someone "who, with or without reasonable accommodation, can perform the essential functions of the employment position"—is protected by section 12112(a)'s antidiscrimination rule. 42 U.S.C. § 12111(8). The plain language of the ADA, as well as Rehabilitation Act precedents upon which the ADA was based, contradict the Ninth Circuit's ruling that a person who will be seriously harmed or killed performing the essential functions of the job is a "qualified individual." As the Seventh Circuit has correctly held, a person who cannot perform the essential functions of a job without exacerbating a serious medical condition is not "qualified to do the job" and is not "entitled to protection under the ADA." *Koshinski* v. *Decatur Foundry, Inc.*, 177 F.3d 599, 603 (7th Cir. 1999). The issue whether a person who poses a serious threat to self is a "qualified individual" was decided below, is encompassed in the question presented, and is ripe for decision.

A. Under The Plain Language Of Section 12112(a), An Individual Who Poses A Serious Threat To Self Is Not "Qualified."

The Ninth Circuit incorrectly held that the section 12113(b) defense is "the exclusive way" in which safety-based qualifications may be taken into account under the ADA. J.A. 208-210. This Court has previously "questioned whether [this interpretation] is a sound one" (*Albertsons*, 527 U.S. at 569-570 n.15), and Justice Thomas has pointed out that a person's inability to perform a job safely may mean that he or she is not "a qualified individual" with respect to the job sought. *Id.* at 578-580 (Thomas, J., concurring). This Court's doubts in *Albertsons* were fully justified. Plain statutory language shows that a disabled individual's qualifications to do a job are relevant not only to the section 12113 defense, but also to the logically prior question whether a person is "a qualified

individual." See *Koshinski*, 177 F.3d at 603 ("The 'direct threat' issue arises * * * only after an ADA plaintiff has made out a prima facie case * * * that he was entitled to protection under the ADA"). Like other concepts that Congress used in overlapping ways in a number of different provisions of the ADA, a person's qualifications are relevant at more than one level of the ADA analysis. See, *e.g.*, 42 U.S.C. §§ 12111(8), 12112(a) ("reasonable accommodation" is an element in determining if a person is "a qualified individual"); *id.* § 12112(b)(5)(A) ("reasonable accommodation" is an element in the definition of "discriminate"); *ibid.*; § 12111(10) ("reasonable accommodation" is an element in the employer's "undue hardship" defense").

The term "qualified" means "fitted" by "endowments * * * for a given purpose." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (1996). It is contrary to common usage and common sense to suggest that a person whose medical condition threatens injury or death in a particular job is "fitted" for that job; he is plainly *unfitted*. Moreover, the language in which the term "qualified individual" is defined in section 12111(8)—a person who "can perform the essential functions" of the job—is prospective in focus. An individual who will be injured or killed by performing the essential functions of a job *cannot* perform those functions on a continuing basis. See Br. for the United States as *Amicus Curiae* in Support of Ptn. for Cert. 14-15 ("When there is a high probability that an employee will suffer serious injury or death in the near future because of his performance of the job, there is a significant risk that the employee will not be able to perform the essential functions of the job on an on-going basis"); David Mahoney & Jeffrey Kendall, *supra*, 42 U. PITT. L. REV. at 794 (when "there is a high probability of future harm, [courts should] find that the employee does not have the present ability to perform the job"). Respondent would rewrite the law to say that a person is "qualified" if he "can perform the essential functions of the job,

whether or not those functions would kill or injure him." Congress did not so declare.

The term "qualified" also means "having complied with the specific requirements [for] employment." WEBSTER'S, *supra*. In accordance with that ordinary usage, section 12111(8) mandates consideration of "the employer's judgment as to what functions of a job are essential," especially as evidenced by a written job description. See 29 C.F.R. § 1630.2(n)(3). Here, Chevron prepared a description of the plant helper position that detailed, among other things, the physical demands of the job and the physical abilities a person had to have to be qualified to perform the job, including the ability to withstand exposure to hydrocarbons, solvents, and other chemicals. See *supra*, p. 5; J.A. 65-66. There is no sign that Congress meant to preclude an employer from stipulating that an element of each essential function of a position is the ability to perform it safely. See *Amego*, 110 F.3d at 143 (Congress did not intend "to preclude the consideration of essential job functions that implicate the safety of others as part of the 'qualifications' analysis").

To the contrary, the EEOC has recognized that an employer may insist that a prospective employee have qualifications that go beyond "skill, experience, [and] education" to include any other job-related requirements of the employment position, including "physical, medical, [and] safety" requirements. 29 C.F.R. § 1630.2(q); see *id.* § 1630.2(m) (a "qualified individual" is a person who "satisfies the requisite skill, experience, education, and other job-related requirements" of the position). There is no basis in the statutory language for restricting consideration of safety-related qualifications to the "qualifications standards" defense. If an employer's "physical, medical, [and] safety" requirements for a position are proper "qualification standards," as the EEOC's regulations state, then they must also be relevant to the question whether a person is "qualified" within the meaning of sections 12112(a) and 12111(8).

Accordingly, courts applying the plain langu ge of the ADA have frequently held that individuals with disabilities are not "qualified" if they cannot perform essential job functions without seriously endangering themselves or others. See *Koshinski*, 177 F.3d at 602-603 (plaintiff with degenerative osteoarthritis was not "qualified" to operate blast furnace because "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from"); *Amego*, 110 F.3d at 144-147 (suicidally depressed individual was not "qualified" for position dispensing dangerous drugs); *Turco* v. *Hoechst Celanese Corp.*, 101 F.3d 1090, 1093-1094 (5th Cir. 1996) (diabetic plaintiff who worked "with complicated machinery and dangerous chemicals" was not a qualified individual "due to the safety risk that he imposed upon himself and others"); *Foreman*, 117 F.3d at 809 (employee's "pacemaker rendered him medically unqualified to perform th[e] essential function" of working close to power lines and welding equipment that would interfere with the pacemaker's operation); *Borgialli* v. *Thunder Basin Coal Co.*, 235 F.3d 1284, 1292, 1294 (10th Cir. 2000) (employee "who worked with explosives" and "threatened suicide and perhaps injury to others" was not "qualified").

B. To Be "Qualified," Individuals Must Show That They Can Perform Essential Job Functions Safely.

That a disabled individual who would be injured or killed performing a job is not "qualified" for the position is strongly confirmed by Rehabilitation Act regulations and caselaw, on which the ADA was closely modeled. H.R. Rep. Pt. 3, 1 Leg. Hist. 485 (the ADA "is based on the same standard for 'qualified' person with a disability that has existed for years under the Rehabilitation Act"); see also 1 Leg. Hist. 71, 100, 124, 328; 42 U.S.C. § 12201(a); 29 U.S.C. § 794(d); Statement of President George Bush, 1990 U.S.C.C.A.N. 601 (July 26, 1990) ("existing language and standards from the Rehabilitation Act were incorporated into the ADA"); *Bragdon*, 524 U.S. at

645 (relying on "administrative and judicial interpretation" of the Rehabilitation Act to construe the ADA); Chai Feldblum, *supra*, 64 TEMP. L. REV. at 542-543 (the ADA's "guiding principle * * * was to track the section 504 approach," in particular "section 504 regulations and caselaw").

Section 504 of the Rehabilitation Act protects from discrimination any "otherwise qualified individual with a disability." 29 U.S.C. § 794. As under the ADA, to be "otherwise qualified" under the Rehabilitation Act a disabled person must be able to "perform 'the essential functions' of the job in question." *Arline*, 480 U.S. at 287 n.17; see 29 C.F.R. § 1614.203(a)(6). Prior to passage of the ADA, this Court held that a person who cannot perform a job without posing a "significant risk" to health and safety "will not be otherwise qualified for his or her job if reasonable accommodation will not eliminate that risk." *Arline*, 480 U.S. at 287 n.16; see also *Chiari* v. *League City*, 920 F.2d 311, 316-317 (5th Cir. 1991) (under the Rehabilitation Act, "a significant risk of personal injury" that cannot be eliminated renders a person not "otherwise qualified"). Likewise, since 1978 the EEOC's regulations interpreting section 504 have defined a "qualified individual" to exclude a person who cannot "perform the essential functions of the position in question without endangering the health and safety of the individual or others." 43 Fed. Reg. 12293, 12295 (Mar. 24, 1978); 29 C.F.R. § 1614.203(a)(6) (2001). It was thus well settled prior to passage of the ADA that a person who posed a safety risk to himself or others was not "otherwise qualified" under the Rehabilitation Act. More recent cases take the same approach. *E.g.*, *Knapp*, 101 F.3d at 482-485; *Chandler* v. *Dallas*, 2 F.3d 1385, 1393-1395 (5th Cir. 1991).

Courts also have long held that it is the job applicant who has the burden under the Rehabilitation Act to prove that he or she was "otherwise qualified" for the position in question. See, *e.g.*, *D'Amico* v. *New York*, 132 F.3d 145, 149 (2d Cir. 1998) (a

Rehabilitation Act "plaintiff bears the ultimate burden of proving by a preponderance of the evidence that he is qualified for the position") (citing *Teahan* v. *Metro-North Commuter R.R.*, 951 F.2d 511, 515 (2d Cir. 1991)); *Doe* v. *New York Univ.*, 666 F.2d 761, 774, 777-779 (2d Cir. 1981) ("a plaintiff must prove * * * that she is 'otherwise qualified' for the position sought" and failed to do so when she "pose[d] a significant risk of harm to [herself] or others"); *Chiari*, 920 F.2d at 315-317 (a plaintiff "must prove that * * * he is 'otherwise qualified' to be a construction inspector" and failed to do so when the evidence showed that because of his Parkinson's disease he would be at "significant risk of personal injury" and also endanger others); *Strathie* v. *Department of Transp.*, 716 F.2d 227, 230 (3d Cir. 1983) (plaintiff "bears the ultimate burden of proof" as to "whether [plaintiff] is 'otherwise qualified'"); *American Fed'n of Gov't Employees* v. *Skinner*, 885 F.2d 884, 897 (D.C. Cir. 1989) (same).

Congress intended to adopt in the ADA the burdens of proof established under the Rehabilitation Act. See S. Rep., 1 Leg. Hist. 136 ("The Committee intends that the burden of proof * * * be construed in the same manner in which parallel agency provisions are construed under Section 504 of the Rehabilitation Act"); H.R. Rep. Pt. 2, 1 Leg. Hist. 345 (same). Unsurprisingly, therefore, courts interpreting the ADA have imposed the burden on plaintiffs to prove that they are "qualified" under section 12112(a) and 12111(8). See, *e.g.*, *Koshinski*, 177 F.3d at 602-603 (the "plaintiff bears the burden of establishing that he is a 'qualified individual with a disability'" and had not done so where "there was no way to do the job * * * without subjecting himself to the very things his doctors recommended he stay away from"); *Amego*, 110 F.3d at 142-143 ("It is generally accepted that, in a Title I [ADA] case, the plaintiff bears the burden of showing she is a 'qualified' individual," including the burden "to show that he or she is qualified in the sense of not posing a direct threat");

Borgialli, 235 F.3d at 1292; *Turco*, 101 F.3d at 1093-1094; *Foreman*, 117 F.3d at 810.

This allocation of the burden of persuasion to the plaintiff seeking compensatory and punitive damages is consistent with the longstanding rule that the burden on an issue lies "upon him who must assert it as the ground of the recovery which he seeks." *Commercial Molasses Corp.* v. *New York Tank Barge Corp.*, 314 U.S. 104, 110 (1941). The ADA plaintiff has access to information relevant to his own medical condition (see *Concrete Pipe & Prods., Inc.* v. *Construction Laborers Pension Trust*, 508 U.S. 602, 626 (1993)), and is properly allocated the burden of proof on all elements of his cause of action.

C. Echazabal Failed To Satisfy His Burden To Prove That He Is A Qualified Individual.

Consistent with these precedents, Echazabal had the burden to prove that, at the time Chevron denied him employment, he was a "qualified individual" within the scope of ADA sections 12112(a) and 12111(8). In order to meet that burden, Echazabal had to show that there was evidence, reasonably available to Chevron when it made its decision, demonstrating that he could perform the essential functions of the job without posing a significant risk of serious injury to himself or to others.

As we have explained in Part I.E, *supra*, Echazabal produced *no* medical evidence reasonably available to Chevron when it made its decision that casts doubt on the conclusions of Echazabal's own physician and three experienced Chevron doctors that Echazabal's life would be endangered by working with hydrocarbons and solvents. Two years after he was denied a job, Echazabal produced declarations of two physicians, hired for purposes of this litigation, who disagreed with Chevron's and Echazabal's doctors. Those litigation reports were not available to Chevron when it made its decision not to hire Echazabal. Every medical opinion that was "relied upon and available to Chevron" at that time concluded that "any

exposure" to the toxins in the refinery would put Echazabal at "immediate" and "serious" risk. J.A. 185.

In these circumstances, Echazabal failed to meet his burden to demonstrate that he was a "qualified individual" with respect to the plant helper job. Because he failed to bring himself within the scope of the ADA's protections in the first place, the section 12113 defense does not come into play. Even if Echazabal had brought himself within the Act, Chevron amply made out a "qualification standards" defense under section 12113, as we demonstrated above. See *supra*, Part I.E.

CONCLUSION

The judgment of the court of appeals should be reversed.[17]

Respectfully submitted.

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[17] Because the Ninth Circuit's erroneous interpretation of the ADA infected its ruling as to each count (see *supra*, p. 13 n.7), this Court should reverse as to *all* of Echazabal's claims.

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